STATE PERSONNEL BOARD, STATE OF COLORADO

Case No. 97B137

KATHRYN L. LAWLEY,

INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE

Complainant,

vs.

DEPARTMENT OF HIGHER EDUCATION, BOARD OF TRUSTEES OF THE UNIVERSITY OF COLORADO, UNIVERSITY OF NORTHERN COLORADO,

Respondent.

This matter came on for hearing before Administrative Law Judge Robert W. Thompson, Jr. on February 20, 1998. Respondent was represented by Robin R. Rossenfeld, Assistant Attorney General. Complainant appeared and was represented by Nora V. Kelly, Attorney at Law.

Complainant testified on her own behalf and called the following other witnesses: Jean Schober, Dean of Students; Phillip Rangel, Human Resources Specialist; Michael Thacker, Accountant II; and Terence Urista, Chief of Campus Police Department, University of Northern Colorado.

Respondent's witnesses were: Robert Hetzel, Executive Director of Auxiliary Services; Sandra Kovel, Human Resources Specialist; and Dennis Hayzlett, Director of Personnel Services, University of Northern Colorado.

Stipulated into evidence were Complainant's Exhibits D, E, F, G, I, J, K, L, M, O, P, V, X, Z and AA, and respondent's Exhibits 1, 3, 4, 5, 6, 8, 9 and 10. Admitted over objection were complainant's Exhibits B, BB and CC. Admitted without objection were complainant's Exhibit W and respondent's Exhibit 2. Exhibits C, H and 12 were excluded.

MATTER APPEALED

Complainant appeals the abolition of her position.

ISSUES

- 1. Whether the action abolishing complainant's position was arbitrary, capricious or contrary to rule or law;
- 2. Whether respondent's action constitutes discrimination based on gender;
- 3. Whether either party is entitled to an award of attorney fees and costs.

PRELIMINARY MATTERS

Complainant's motion to allow the testimony of Jean Schober by telephone from Greeley was granted without objection. An order was entered sequestering the witnesses except for the complainant and Dennis Hayzlett, the respondent's advisory witness.

FINDINGS OF FACT

- 1. Complainant, Kathryn Lawley, was the Director of Parking Services at the University of Northern Colorado (UNC or University) from June 1988 until the position was abolished in June 1997. She was classified as a Program Administrator I.
- 2. The years 1993 through 1996 saw a gradual drop in enrollment at UNC from 10,458 to 10,306, a decline of 152 students over a period of four years.
- 3. The TABOR amendment, passed by the voters in 1992, capped the general funds for the University and resulted in a required \$160,000 reduction in salaries. Precisely, the President of the University together with the three Vice Presidents determined that \$159,607 needed to be cut from state funded salaries.
- 4. There are two sources of UNC funds. "State-side" funds are appropriated by the state legislature. The state-side budget is where the salary savings were called for. The other funding source is auxiliary services, such as housing, food service and parking. By statute, the auxiliary services cannot be used to support the state-side budget.
- 5. By fiscal year 1997-1998, the University Police Department, within the Department of Finance and Administration, was the only operating unit that had not been affected by the salary reduction need. For this reason, the Police Department was reviewed with the intent of decreasing the state-side budget by \$40,000, which would result in the attainment of an overall reduction of \$160,000 in salaries.

- 6. The parking services unit is under the purview of the University Police Department. The parking services unit is self-funded through such sources as decals, meters and parking spaces.
- 7. Lawley's duties included budget development, marketing, hiring and evaluation of employees, disciplinary matters, parking policies and procedures, contract negotiation, allocation of parking spaces and routine daily functions related to parking.
- 8. At the time that her position was abolished, Lawley was at pay grade 105 with a salary of \$67,680. Her salary was paid from the auxiliary budget and did not have a direct impact on the state-side budget. Her hours were 8:00 a.m. until 5:00 p.m., Monday through Friday.
- 9. Throughout Lawley's tenure as parking services director, the parking services budget had a surplus. It generated approximately \$750,000 in annual revenue. In June 1997, the budget showed a balance of \$267,000.
- 10. Lawley's direct supervisor was Terry Urista, Chief of the University Police. His salary was paid from the state-side budget.
- 11. In the spring of 1997, Robert Hetzel, now Executive Director of Auxiliary Services, was the assistant to Steve Garcia, who was the Vice President of Administration and in charge of the mission to accomplish a salary savings in his division. Hetzel was directed to develop the plan.
- 12. Garcia set three criteria for the plan: a) no employee be left without a job; b) salaries remain commensurate with what they were; c) all essential services continue. It was critical to the

President, and to Garcia, that no employees lose their job.

- 13. Hetzel gained information of the salaries of the parking services director at comparable universities and concluded that the salary of those positions was less than that of the parking services director at UNC. Compared to Colorado State University, where the student enrollment is twice that of UNC, the salaries were about equal.
- 14. Hetzel's final proposal was to abolish the director's position, re-assign Lawley, create a new position at a lower level to handle the day-to-day activities of the parking services unit, transfer the high-level functions, such as budgeting, to the Chief of Police and pay \$40,000 of Chief Urista's salary from the auxiliary services budget, thus saving \$40,000 in the state-side budget.
- 15. Part and parcel to the plan was to transfer Lawley to a current position being vacated by way of a medical retirement, place in the new position an employee, a male, who would otherwise bump another employee, also a male, who was considered highly valuable in his present capacity.
- 16. Hetzel did not confer with either the Chief of Police or the Director of Parking Services in formulating his proposal.
- 17. Hetzel presented his proposal to Vice President Garcia, who approved it. (See Exhibit 10, memo from Hetzel to Dennis Hayzlett describing the decision-making process; Exhibits D, K.)
- 18. On March 4, 1997, Hetzel met with Lawley and Urista and advised them that the position of Parking Services Director would be abolished, Urista would take over certain functions and Lawley

could bump into a position being vacated via a medical retirement. That position was at pay grade 95.

- 19. Urista, who was opposed to the changes, subsequently made an alternative suggestion to Hetzel. There is a question of whether Hetzel accurately communicated Urista's idea to Garcia.
- 20. On May 1, 1997, Dennis Hayzlett, Director of Personnel Services, advised Lawley in writing that her classified position of Program Administrator I would be abolished effective June 16, 1997 due to "reorganization and budget constraints." Lawley was advised that there were no vacant positions at the level of Program Administrator I but that she could exercise her retention rights to a Police Officer III position. (Exhibit 3.)
- "reorganization" came to be used in conversation and various memos in reference to the reorganization of parking services for budgetary purposes. However, the reason for the changes were always budgetary. Reorganization in the formal sense was never intended, and the State Personnel Board rules pertaining to reorganization were not followed. Hayzlett testified that he used the word "reorganization" in the informal sense when he wrote the letter of May 1, and that the sole reason was "budget constraints."
- 22. Given her options, Lawley exercised her bumping rights to the Police Officer III position and requested saved pay. (Exhibits E, F.) The request for saved pay was approved only through June 30, 1997 because the purpose of the abolition of the position was to save money. (Exhibit I.)
 - 23. Lawley filed an appeal of the administrative action on

May 5, 1997.

- 24. On June 12, 1997, Chief Urista submitted a memo to Frances Schoneck, who had replaced Garcia as Vice President of Administration, asking that the reorganization be reversed. He proposed a plan that he felt would accomplish the necessary savings without eliminating Lawley's position. (Exhibit J.) There is no evidence that this proposal was ever considered.
- 25. On July 24, 1997, Lawley filed a formal grievance of the assignment of her duties as a police lieutenant on uniform patrol. (Exhibit T.) The grievance was resolved when Lawley was appointed to the position of Police Administrator I at pay grade 101 retroactive to July 1, 1997.
- 26. Lawley's current annual salary is \$61,392. She works ten hours per day, Wednesday through Saturday from 4:00 p.m. until 2:00 a.m.

DISCUSSION

In this appeal of an administrative action, unlike a disciplinary proceeding, the complainant bears the burden of proving by preponderant evidence that the action of the respondent was arbitrary, capricious or contrary to rule or law. Renteria v. Department of Personnel, 811 P.2d 797 (Colo. 1991); Department of Institutions v. Kinchen, 886 P.2d 700 (Colo. 1994). The State Personnel Board (Board) may reverse respondent's action only if the action is found arbitrary, capricious or contrary to rule or law. \$24-50-103(6), C.R.S. Complainant also bears the burden to prove that she was discriminated against on the basis of gender. McDonnell Douglas Corp. v. Green, 411 U.S. 792 (1972).

In determining whether an administrative agency's decision is arbitrary and capricious, the administrative law judge (ALJ) must determine whether a reasonable person, considering all of the evidence in the record, would fairly and honestly be compelled to reach a different conclusion. Ramseyer v. Colorado Department of Social Services, 895 P.2d 506 (Colo. App. 1992). It is for the judge, as the trier of fact, to determine the persuasive effect of the evidence and whether the burden of proof has been satisfied. Metro Moving and Storage Co. v Gussert, 914 P.2d 411 (Colo. App. 1995).

The only permissible reasons for a layoff are lack of funds, lack of work or reorganization. Board Rule 9-3-1, 4 Code Colo. Reg. 801-1. Here, complainant's position was abolished for lack of funds, despite references to a "reorganization." Respondent concedes that the Board's rules required of a reorganization were not followed. Consequently, complainant's assertion that respondent failed to comply with the personnel rules in this regard is also conceded. Respondent's action is thus analyzed in terms of the budgetary reasons alleged for the layoff.

Complainant submits that respondent's action was arbitrary and capricious because the financial goals could have been met in another way, one of the goals was to protect the job of a male employee, Chief Urista's proposal was not considered, complainant was not given the opportunity to take a voluntary demotion while keeping the same duties, complainant was not granted saved pay and her job should not have been affected since her salary was not funded from the state-side budget. She alleges that she was discriminated against because the job status of two male employees was considered in the decision-making process. Complainant does not

challenge the procedure by which retention rights were exercised.

The outcome of this case is governed by Hughes v. Department of Higher Education, 934 P.2d 891 (Colo. App. 1997) (Ruland, J., dissenting). In Hughes, the ALJ, affirmed by the Board, found the action of the University of Colorado in a layoff to be arbitrary and capricious because the University had not considered several significant issues, particularly complainant's individual job performance and unique qualifications. In reversing the decision of the ALJ and the Board, the court said:

The decisions the University had to make involved not only matters of budget and administration but also matters of services and future goals. At their core, these matters consist of a multitude of policy considerations, including the University's mission and core values, its program priorities and focus, and the initiatives it hopes to emphasize in its future development. The factors to consider and the weight or priority to be given any particular factor is for the University to determine. With regard to matters of this nature, the University possesses broad discretionary authority to develop and adopt the plans.

The scope of review of agency action of this nature is exhausted if a rational basis is found for the decision made or the action taken. (Cite omitted.) It is not within the province of the ALJ, the Board, or this court to operate or second-guess the University in the making of these decisions which are based on intertwined, and conflicting, policy grounds. The fact that the ALJ, the Board, or this court may disagree with the decision, or conclude that the University failed to consider adequately all appropriate circumstances, does not deny the decision a rational basis.

934 P.2d at 895-96 (emphasis supplied).

As did the complainant in *Hughes*, supra, Lawley disagrees with the University's decision and its failure to take into

consideration all of the appropriate circumstances. Nonetheless, as in *Hughes*, this does not deny the decision a rational basis.

Whether complainant should have been allowed to voluntarily demote so she could do the same job but at a lower salary is a dubious proposition under the classification rules. It certainly is not required. Nor is the University's decision to formulate a plan preserving a job for all current employees prohibited. Whether the University violated the statutory mandate prohibiting the use of auxiliary funds to support the state-side budget may be argued, but it was not proven. In fact, Chief Urista felt that moving one-half of his salary to the auxiliary budget was a valid way to address the budget issue. (See Exhibit J.) Overall, there is a rational basis to support respondent's action, even though there may have been other options.

Whether to grant saved pay is a question left to the discretion of the agency. Board Rule 9-3-7(J), 4 Code Colo. Reg. 801-1. There was no showing of an abuse of this discretion. The agency may choose at a later date to place Lawley at a step that the employee could have been granted if pay had been saved. *Id*.

Complainant demonstrated a prima facie case of discrimination by showing that she is a member of a protected group (female), was qualified for her position and suffered an adverse employment consequence. Colorado Civil Rights Commission v. Big O Tires, Inc., 940 P.2d 397 (Colo. 1997). She failed to prove by preponderant evidence that respondent's asserted business reason for the action was a mere pretext for discrimination. Texas Department of Community Affairs v. Burdine. 450 U.S. 248, 254 (1981). There was no showing that respondent's action was the result of intentional discrimination. St. Mary's Honor Center, et.

al. v. Hicks, 509 U.S. 502 (1993).

This is not a proper case for the award of attorney fees and costs under \$24-50-125.5 of the State Personnel System Act.

CONCLUSIONS OF LAW

- 1. The action abolishing complainant's position was not arbitrary, capricious or contrary to rule or law.
 - 2. Respondent did not discriminate on the basis of gender.
 - 3. Neither party is entitled to an award of fees and costs.

ORDER

Complainant's appeal is dismissed with prejudice.

DATED this day of	
March, 1998, at	
Denver, Colorado.	Administrative Law Judge

CERTIFICATE OF MAILING

This is to certify that on the ____ day of March, 1998, I placed true copies of the foregoing INITIAL DECISION OF THE ADMINISTRATIVE LAW JUDGE in the United States mail, postage prepaid, addressed as follows:

Nora V. Kelly Attorney at Law 1776 Lincoln Street, Suite 118 Denver, CO 80203

and in the interagency mail, addressed as follows:

Robin R. Rossenfeld
Assistant Attorney General
State Services Section
1525 Sherman Street, 5th Floor
Denver, CO 80203
